United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

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SUBJECT: C & M Service, Inc., Hogan Motor Leasing, Inc., Transportation Maintenance Service, L.L.C., Jointly
Case 14-CA-23828

This case was submitted for advice as to whether the Employer, whose pre-existing facility had employees in two separate bargaining units represented by different unions, violated Section 8(a)(2) and (5) of the Act by transferring certain work to a new facility, and by, prior to the time any employees were hired at the new facility, recognizing one of the two unions at the pre-existing facility as the sole representative of all employees at the new facility.

FACTS

C & M Service, Inc. (C&M) services and fuels trucks at its facility in St. Louis, Missouri, as well as on its customers' premises. C&M's principal customer is Hogan Motor Leasing, Inc. (HML), which leases trucks and provides for the servicing of these trucks. Both C&M and HML are solely owned by Carl Hogan Sr., with two of Hogan's sons as the chief operating officers of the two companies.

For more than 30 years prior to early 1995, C&M has had two separate bargaining units established through voluntary recognition. Approximately 32 mechanics and other highly skilled employees were represented by the International Association of Machinists and Aerospace Workers, District 9 (Machinists District 9). Another 13 employees engaged in tire repair, lubrication, washing, parts, and janitorial work were represented by Automotive, Petroleum and Allied Industries Employees Union, Local 618, affiliated with International Brotherhood of Teamsters (Teamsters Local 618). C&M's 1993-1996 collective-

bargaining agreement with Teamsters Local 618 included provisions stating:

> 2. JOB SECURITY - In order to provide employees with the maximum job security, it is hereby agreed as follows:
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> The Employer shall not permit any of its employees who are not in the bargaining unit covered by this Agreement to do any of the work which is done by Employees within the bargaining unit; further:
>
> (a) The Employer shall not engage any outside persons, firms or corporations to do any of the work done by the Employees covered by this Agreement, except by mutual agreement in writing.
> . . .

In 1994, HML decided to establish a new facility to maintain its leased equipment, and to transfer work from C&M's facility to the new one. A new corporate entity was formed to build and operate the new facility, Transportation Maintenance Service, L.L.C. (TMS), which is jointly owned by the sons of Carl Hogan, including Carl Hogan, Jr. and Brian Hogan, the chief operating officers of C&M and HML. From its inception, TMS was intended to have the same "flexibility" as several of HML's other facilities that had only one, wall-to-wall, bargaining unit.

In early 1995,[1] Carl Hogan, Jr. and Brian Hogan contacted Machinists District 9 regarding the new operation and began negotiations concerning preferential hiring at the new facility, as well as for a collective-bargaining agreement applicable to the new facility. During these negotiations, on April 28, C&M chief operating officer Carl Hogan, Jr. wrote Teamsters Local 618 regarding work involving an HML customer, stating in full:

> This is to advise you that C&M will no longer service the Sysco vehicles at our 14th Street location.

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[1] All dates hereinafter are in 1995, unless otherwise noted.

> Because of our already overcapacity servicing of our other customers at 14th Street, this will not mean any layoff or curtailment of hours of any 618 employee.
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> Nevertheless, Hogan Motor Leasing is in the process of exploring a business arrangement whereby some Hogan entity will be in a position to provide on-site services to Sysco. We expect such arrangements to reach a definition point in the next 45 to 60 days, after which we should be in a position to share how such arrangements could effect [sic] our Teamster 618 employees.
>
> I will plan to be in contact with you as soon as that definition point is arrived at, but if you have any questions prior to that time, please do not hesitate to contact me.

No further information was given to Teamsters Local 618 prior to the opening of the new TMS facility.

In mid-summer, TMS and Machinists District 9 reached a collective-bargaining agreement, ostensibly executed on September 1,[2] as well as an agreement providing for the transfer to TMS of 12 employees from the Machinists District 9 unit at C&M. The collective-bargaining agreement, effective by its terms from July 1 to June 30, 1997, includes a union security provision, as well as giving the transferred employees seniority credit for their service at C&M and bumping rights between TMS and C&M in the event of a layoff.

On September 9, the new TMS facility opened with 15 employees, 12 of which had transferred from the Machinists District 9 unit at C&M. These employees performed the Sysco work formerly performed by both units at C&M. It appears that C&M or HML simultaneously terminated a subcontract for tire repair work, and had C&M's Teamsters Local 618 unit employees perform this work. Due to this additional tire work, no Teamsters Local 618 unit employees lost their jobs, although it is likely that their work functions were affected in that they performed a greater

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[2] A drug policy addendum bears an execution date of August 1.

percentage of tire repair work. In addition, one employee who had worked in Sysco's garage was relocated to C&M's facility.

On September 12, Teamsters Local 618 protested to C&M over the transfer of its work to TMS. C&M responded that it had no control over the work at issue, and that no Teamsters Local 618 unit employees had lost work. On October 13, Teamsters Local 618 filed a grievance over the assignment of the Sysco work outside the bargaining unit; this grievance was denied as untimely, as well as for the reasons previously stated by C&M.

On October 24, Teamsters Local 618 filed the instant charge, amended November 9, alleging that C&M, HML, and TMS jointly violated Section 8(a)(2), and (5) by removing the Sysco work contrary to the terms of the Teamster Local 618/C&M collective-bargaining agreement, and by unlawfully assisting Machinists District 9 to become the representative of the employees doing that work.

The Region has determined that C&M, HML, and TMS constitute a single employer (the Employer).

ACTION

We conclude that the Employer violated Section 8(a)(2) and (5) of the Act by removing the Sysco work contrary to the terms of the Teamster Local 618/C&M collective-bargaining agreement, and by unlawfully assisting Machinists District 9 to become the representative of the employees doing that work.

The transfer of the Sysco work

Initially, we conclude that the Employer's transfer of the Sysco work from the C&M facility to the new TMS facility violated Section 8(a)(5) of the Act as it was clearly contrary to the provisions of the parties' collective-bargaining agreement currently in effect. It is settled law that an employer's midterm contract modification made without the consent of the employees' collective-bargaining representative is a violation of

Section 8(a)(5) of the Act as elucidated in Section 8(d).[3] In the instant case, C&M's 1993-1996 collective-bargaining agreement with Teamsters Local 618 included provisions explicitly stating that unit work may not be done by non-unit employees or subcontracted, without the written consent of Teamsters Local 618. Thus, the Employer violated Section 8(a)(5) of the Act by transferring the Sysco work from Teamsters Local 618 employees at the C&M facility to Machinists District 9 employees at the new TMS facility in the absence of Teamsters Local 618's consent.[4]

This conclusion is not affected by the Board's decision in Westinghouse Electric Co.,[5] and subsequent cases in that line. In Westinghouse, the Board held that the employer acted lawfully in failing to bargain over each individual act of subcontracting where those actions were entirely consistent with a practice that had been knowingly acquiesced in by the union over many years. As one factor supporting its holding, the Board noted that it had not been shown in that case, "that the subcontracting engaged in had any significant impact on unit employees' job interests." As the Board has recently held,[6] however, the rationale of Westinghouse is inapposite where the parties had previously reached an agreement limiting the employer's right to subcontract unit work; such an employer violates Section 8(a)(5) by unilaterally subcontracting contrary to the parties' agreement.[7] As the relevant parties in the

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[3] Speedrack, Inc., 293 NLRB 1054 (1989). See Allied Chemical & Alkali Workers Local 10 v. Pittsburgh Plate Glass, 404 U.S. 157, 159 fn. 2, 185-187 (1971).

[4] See, e.g., Mack Trucks, Inc., 294 NLRB 864, 865 (1989); Oak Cliff-Golman Baking Co., 207 NLRB 1063, 1064 (1973), enfd. mem. 90 LRRM 2615 (5th Cir. 1974)("The unambiguous language of Section 8(d) of the Act explicitly: (1) forbade Respondent's midterm modification of the [contract] without the Union's consent; and (2) granted to the Union the privilege it exercised to refuse to grant consent.").

[5] 150 NLRB 1574, 1576-1577 (1965).

[6] Wehr Constructors, Inc., 315 NLRB 867, 868 (1994).

[7] Ibid. Thus, we need not address whether Westinghouse itself would otherwise be applicable to transfers of unit

instant case have precisely such an agreement, as set forth above, we conclude that the Employer's transfer of the Sysco work from Teamsters Local 618 employees at the C&M facility to Machinists District 9 employees at the new TMS facility violated Section 8(a)(5) of the Act.

The assistance of Machinists District 9 at the new facility

As for TMS' assistance of Machinists District 9 at the new facility, we further conclude that such conduct violated Section 8(a)(2) of the Act. In brief, we are here faced with an employer who: (1) gave employees represented by Machinists District 9 preferential hiring rights at the future TMS facility, with the explicit intent of having only one union representing all employees at that facility; (2) decided to unlawfully remove Teamsters Local 618 bargaining unit work in order to give it to employees represented by Machinists District 9; (3) recognized Machinists District 9 as the representative of all of the future employees at the TMS facility and negotiated a collective-bargaining agreement which would act as a contract bar to any representation case at the new facility and which contained a union security clause, prior to hiring at, or transferring any employees to, the new TMS facility; and (4) hid all of these plans from Teamsters Local 618 until after the new TMS facility opened, despite the fact that Teamsters Local 618 represented the employees having jurisdiction of the work at issue. This undisputed preference for Machinists District 9, along with the actions taken in support thereof, constitutes unlawful assistance in violation of Section 8(a)(2) of the Act, which has long been held to prohibit an employer from giving the work of units represented by two different

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work within a single employer, rather than subcontracting to an outside party. Similarly, we need not address whether the effects of the work transfer in the instant case, i.e., the transfer of one employee from Sysco's garage to C&M's facility and the presumably higher percentage of tire work done by employees in the Teamsters Local 618 unit, would have a "significant impact on unit employees' job interests."

unions at a pre-existing facility to one union at a newly established location.[8]

This conclusion is not in conflict with the Board's decision in Gitano Distribution Center.[9] In Gitano, the Board announced that, when an employer transfers a portion of its represented unit employees from one location to a new location, or would have transferred such employees but for unlawful discrimination, the Board will rebuttably presume that any units at the new facility are separate appropriate units from those at the pre-existing facility. Significantly, although an effects bargaining violation was found in that case, the Board in Gitano was not faced with circumstances, as here, where the decision to transfer the work to the new facility was alleged itself to be unlawful or otherwise not privileged by the parties' collective bargaining agreement. Thus, the rule of Gitano set forth above is properly distinguished from the instant case, as a portion of the work transferred to the newly established TMS facility remained within the work jurisdiction of Teamsters Local 618, as a matter of contract and law.

Moreover, even if we apply Gitano to the facts of the instant case, the same result obtains. The Board made clear in Gitano that, in determining the scope of bargaining units at the newly established facility, it will continue to accord great weight to the bargaining history at the pre-existing facility. Thus, in Gitano, where the Board found that the employees at the new facility in that case, including those that were not hired due to the employer's unlawful conduct, comprised two separate appropriate units, the first factor named by the Board supporting this finding was that, "the two employee groups

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[8] See e.g., Fraser & Johnson Co., 189 NLRB 142, 151 (1971), enfd. in pertinent part 469 F.2d 1259, 1262-63 (9th Cir. 1972); International Paper Co., 150 NLRB 1252 (1965). Under such circumstances, Machinists District 9 violated Section 8(b)(1)(A) of the Act by accepting the Employer's unlawful assistance. We note, however, that no 8(b) charges have been filed.

[9] 308 NLRB 1172, 1175-1176 (1992).

have always been separate and distinct."[10] In the instant case, we likewise are presented with a history of separate units and an employer unlawfully preventing a disfavored union from participating in the transfer of work to a new facility. Under these circumstances, we find nothing in Gitano that would conflict with long-settled case law finding a violation of Section 8(a)(2) where an employer gives the work of units represented by two different unions at a pre-existing facility to one union at a newly established location.[11]

The Employer claims that the 8(a)(2) allegation should be dismissed based upon our memorandum in General Motors Corp., Saturn Corp., et al.[12] In that memorandum, we concluded that an employer did not violate Section 8(a)(2) where it: (1) negotiated with a union representing employees at pre-existing facilities for preferential hiring at a new facility; and (2) recognized those employees' union at the new facility.

As to the preferential hiring allegation in that case, however, it was emphasized that there was no evidence that the employer unlawfully favored one union over another or that the employer violated any effects bargaining obligation it may have owed any other union.[13] In the instant case, by contrast, the Employer explicitly chose Machinists District 9 to be the only union at the new facility, while shutting out Teamsters Local 618. Indeed, the Employer didn't even inform the Teamsters' local about the new TMS facility until after it opened. Moreover, as set forth above, not only did the Employer violate any

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[10] Id., at 1176.

[11] See note 8, supra.

[12] General Motors Corp., Saturn Corp., Case 7-CA-24872, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,. Case 7-CB-6582, Advice Memorandum dated June 2, 1986.

[13] Id., at 7. See also General Motors Corporation, Saturn Corporation, Case 7-CA-25819, Advice Memorandum dated December 2, 1986.

effects bargaining obligation it may have owed Teamsters Local 618 as to the transfer of the Sysco work, the decision itself violated Section 8(a)(5) of the Act.

As to the premature recognition allegation in Saturn, we emphasized there that the Saturn agreement at issue would not be a contract bar at the new facility, because it had no definite term and that there was no enforceable union security clause in that case.[14] Thus, the employees eventually hired at the new facility could freely choose to be unrepresented or represented by another union. In the instant case, by contrast, the TMS/Machinists District 9 collective-bargaining agreement would be a contract bar if not prohibited by Section 8(a)(2), and it contains an enforceable union security clause. Thus, it would not only force the employees at the new facility to be represented by Machinists District 9, but it would also require these employees to contribute dues or the equivalent to Machinists District 9. For all these reasons, far from supporting dismissal, adherence to the rationale set forth in our June 1986 Saturn Memorandum requires that complaint issue, absent settlement.[15]

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[14] General Motors Corp., Saturn Corp., Case 7-CA-24872, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,. Case 7-CB-6582, Advice Memorandum dated June 2, 1986, at 6, 9.

[15] The Employer also claims that the 8(a)(2) allegation should be dismissed based upon our memorandum in St. Louis Post Dispatch; Hogan Distribution, Inc.; Joint Employer (Teamsters Local 610), Cases 14-CA-14557, et al., Advice Memorandum dated May 29, 1981. That case, however, solely addressed the bargaining obligation of a successor employer and is wholly inapplicable to the instant case, where no question of successorship arises; the Region has determined that C&M, HML, and TMS constitute a single employer.

Similarly, the Board's decision in Houston Division of Kroger Co., 219 NLRB 388 (1975), is inapposite. In Kroger Co., the Board made it clear that a union and employer may agree to a collective-bargaining agreement that provides for recognition of the union as the representative of newly established, added, or acquired facilities, interpreting such "after-acquired" or "additional stores" clauses as

Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(2) and (5) of the Act by removing the Sysco work contrary to the terms of the Teamster Local 618/C&M collective-bargaining agreement, and by unlawfully assisting Machinists District 9 to become the representative of the employees doing that work.

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providing for recognition of a union based upon a showing of majority status. In the instant case, however, there was no such "after-acquired" clause, no showing of majority has been offered, and the Employer recognized Machinists District 9 as the representative of employees also performing work that had been within the jurisdiction of Teamsters Local 618.